SUBJECT INDEX

	Page
Opinions	1
Statement	2
Argument	7
The record presents no legal issue which will govern other cases, but merely a unique factual situation of interest only to the parties. There is no substantial question as to the proper interpretation of the antitrust laws, and no issue of public importance.	
Conclusion	11

INDEX OF AUTHORITIES

Page

Cases

Duignan v. United States, 274 U.S. 195 10

Exhibitor's Poster Exch. Inc. v. National Screen Serv. Corp., 421 F.2d 1313 (C.A. 5) 10

Hanover Shoe, Inc. v. United Shoe Machinery Corporation, 392 U.S. 481, 88 S. Ct. 2224 8

Keogh v. Chicago & N. W. Ry. Co., 260 U.S. 156, 43 S. Ct. 47 8

Peto v. Madison Square Garden Corporation, 384 F.2d 682 (C.A. 2, 1967), cert. den. 390 U.S. 989, reh. den. 390 U.S. 1046 10

State of Georgia v. Pennsylvania R. Co., 324 U.S. 439, 65 S. Ct. 716 5

Steiner v. 20th Century-Fox Film Corporation, 232 F.2d 190 (C.A. 9) 9

Statutes and Other Authorities

15 U.S.C.A. § 15b 6, 9

Rule 39(a)(1) Federal Rules of Civil Procedure 11
Rule 42(b) Federal Rules of Civil Procedure 7
Rule 52(a) Federal Rules of Civil Procedure 1

No. 716

In the Supreme Court of the United States

OCTOBER TERM, 1970

ELLINGSON TIMBER COMPANY,

Petitioner,

v.

GREAT NORTHERN RAILWAY COMPANY, a corporation; and WESTERN PACIFIC RAILROAD COMPANY, a corporation,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF GREAT NORTHERN RAILWAY COMPANY IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

OPINIONS

On June 20, 1968 the district court entered its Opinion and Order which constituted its findings of fact and conclusions of law under Rule 52(a), Federal Rules of Civil Procedure (App. 79(a)). Although not officially reported, the decision is printed in CCH Trade Cases (1968), § 72.506.

The unanimous Opinion of the United States Court of Appeals for the Ninth Circuit, dated April 21, 1970 (App. 81(a) - 84(a)) is reported at 424 F.2d 497.

STATEMENT

Respondent Great Northern vigorously objects to the unwarranted personal attack made against the experienced and respected district judge by new counsel who represent petitioner for the first time in this Court. It is rash and reckless to charge that the trial court ". . . flagrantly abused its discretion by prematurely and improperly segregating two affirmative defenses for separate trial" (Pet. p. 8); that the court "arrogated to itself" the role of factfinder despite petitioner's claimed insistence on a jury trial (Id.); that the court arbitrarily denied petitioner a reasonable opportunity for discovery (Pet. p. 18), and that the judge's conduct throughout ". . . represents such a stark departure from the accepted and usual course of judicial proceedings as to warrant this Court's exercise of its supervisory powers over the federal judiciary" (Pet. p. 18). These baseless charges result from counsel's distortion of the trial proceedings.

In fact, the record shows that on August 21, 1967, several weeks after repondents had taken the deposition of Mr. Ellingson, petitioner's principal officer (Def.'s pretrial Exhibit 31), the district court set the case for pretrial in October on the segregated is-

sues of statute of limitations and subject matter jurisdiction. At the same time, the court ruled that petitioner's contemplated discovery should be limited to the segregated issues. Petitioner's counsel did not object.

On August 25, 1967 petitioner filed 63 multiple-part interrogatories against Great Northern (Appendix F), which thereafter answered seven and filed objections to the remainder on the ground that they did not relate to the segregated issues (R. pp. 36-48).

On October 16, 1967 these objections were argued before the court (Appendix G). After extensive arguments, the court directed plaintiff's counsel to file ". . . new interrogatories in clear, understandable and succinct language. Set out exactly what you want in not more than 15 interrogatories in the first instance. Then, if these are relevant, you can subsequently apply for more and I will give them to you" (App. pp. 24a-25a). Petitioner's counsel did not object to this ruling.

On October 25, 1967 petitioner filed 12 interrogatories which were claimed to relate to jurisdiction. On November 6, 1967, respondent Great Northern filed answers to interrogatories 4, 5, 6, 8, 9, 11 and 12, and filed objections to interrogatories 1, 2, 3, 7 and 10, on the ground that they were harassing, burdensome and oppressive in requiring the railroad to review all its 1958-1967 records relating to freight shipments in the states of Oregon and California and

to compile and tabulate the results of this very extensive research (R. p. 77).

These objections were heard by the court on November 20, 1967. However, petitioner has not included a transcript of this hearing in its appeal record. A docket entry does show that an order was entered on November 20, 1967 ". . . that if counsel cannot determine matter deft. should file argument and briefs by 11/27/67; ptff. file arguments and briefs by 12/4/67 and these arguments and briefs will be referred to Judge Solomon for a ruling" (Appendix A, p. 2a).

The record fails to show that any further briefs were filed or argument made on the subject of interrogatories. While there is a docket entry under date of December 21, 1967 setting a hearing on objections to interrogatories for January 2, 1968, the transcript of the hearing on that date (Appendix D) indicates only that on the application of petitioner's counsel, the court stated: "You can file a supplemental list of interrogatories" (App. p. 29a); and then said: "If you don't get the information you need, you can take it up with me" (App. p. 30a). A docket entry of the same date directed that petitioner's counsel file "supplemental list of interrogatories relating to question of jurisdiction" (Appendix A, p. 3a). However, no further interrogatories were filed.

On the subject of pretrial discovery, petitioner cannot dispute the finding of the Court of Appeals: "So far as the record shows, plaintiff did not seek to take

depositions, secure the production of documents, or request admissions" (Appendix H, p. 84a).

Although petitioner attached a demand for jury trial to its complaint (Appendix B, p. 14a), the pretrial order on the segregated issues which was approved in writing by all counsel and filed on January 29, 1968, nearly five weeks prior to trial, provided in part: "The Court has heretofore ruled that the issue of this Court's jurisdiction over the subject matter of this action, and the issue of the statute of limitations should be segregated for separate trial before the Court." (R. p. 111).

Neither at pretrial conference, nor at the trial on March 4, 1968, did petitioner's counsel object to a nonjury trial on the segregated issues, nor did petitioner raise the question on its appeal. The Court of Appeals, which raised the question *sua sponte* prior to the argument, correctly concluded that even assuming that the point might be considered, though not raised below, the record established a waiver (Appendix H, p. 84a).

While petitioner attempts to infer that the trial court summarily disposed of the case, the record shows that at the March 4, 1968 trial, petitioner was in no way curtailed in presenting testimony, and that all the documents listed as exhibits in the pretrial order were received in evidence.

Following the trial, counsel for all parties had an opportunity to submit further briefs, following which

the court rendered its opinion and order containing, among others, the following dispositive findings of fact (Appendix G):

> 1. Any act of either respondent which may have damaged plaintiff occurred prior to June 8, 1963;
>
> 2. Petitioner knew of all the respondents' alleged illegal activities prior to June 8, 1963;
>
> 3. The evidence, and in particular the testimony of Mr. Ellingson, shows that petitioner's claim was no more than an attack on rates which petitioner unsuccessfully challenged before the Interstate Commerce Commission;
>
> 4. Petitioner failed to produce any evidence that respondents had continued during the period from 1963-1967 to discriminate in favor of petitioner's competitors, and that the Commission's decision was not involved in this action.

Based upon these findings of fact, the trial court dismissed this action on the ground that it was barred by the four-year statute of limitations contained in 15 U.S.C.A. § 15b, and because the court was without jurisdiction to consider petitioner's claim. The Court of Appeals has affirmed and has determined that the trial court's findings were supported by substantial evidence.

ARGUMENT

The record presents no legal issue which will govern other cases, but merely a unique factual situation of interest only to the parties. There is no substantial question as to the proper interpretation of the antitrust laws, and no issue of public importance.

I

While no direct conflict of decision is pointed out by petitioner, an important question of antitrust trial practice is asserted in connection with petitioner's principal claim that the trial court's exercise of its powers to order a separate trial of separate issues under Rule 42(b) of the Federal Rules of Civil Procedure constituted a flagrant abuse of discretion (Pet. p. 8). The same argument was rejected by the Court of Appeals in an opinion which correctly quotes the material portions of Rule 42(b). On the other hand, the petition fails to point out that a district court may order a separate trial of any separate issue ". . . when separate trials will be conducive to expedition and economy." By its affirmance, the Court of Appeals has approved the trial court's exercise of discretion in this regard. This Court should not be asked to review the exercise of a discretionary power by two federal courts, except perhaps in a very exceptional situation, not present here, involving fundamental constitutional rights.

II

A second alleged reason for review is petitioner's claim that the decision of the Court of Appeals con-

flicts with the decisions of this Court. It is contended that the conflict ". . . resulted from the district court's ruling, as a matter of law, that it lacked jurisdiction to consider the legality under the antitrust laws of a conspiracy that had achieved its unlawful ends *partly* through use of a common carrier rate that had previously been found consistent with the requirements of the Interstate Commerce Commission" (Pet. pp. 8-9).

Even if the issue decided by the lower courts had been the one now presented by petitioner, no conflict of decision is pointed out in the petition. The decisions of the courts below are completely consistent with this Court's decision in *Keogh* v. *Chicago & N.W. Ry. Co.*, 260 U.S. 156, 162-163 (1922), reaffirmed in *State of Georgia* v. *Pennsylvania R. Co.*, 324 U.S. 439, 453, reh. den. 324 U.S. 890 (1945), and explained in *Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481, 491 (1968), as standing for the proposition that because the freight rates had been approved as reasonable by the Interstate Commerce Commission the shipper had no cause of action under the antitrust laws. However, petitioner merely characterizes the *Keogh* case as "irrelevant," without any attempt to distinguish its holding (Pet. p. 21).

III

A third claimed reason for review by this Court is that the Court of Appeals has decided an important question of federal law which has not been, but

should be settled by this Court (Pet. p. 9). Two important questions relating to 15 U.S.C.A. § 15b are claimed by petitioner to have been decided by the courts below: (1) the statute is a bar where maintenance of a joint common carrier rate constitutes the only known "overt" act continuing into the four-year limitation period, and (2) the alleged possession of monopoly power by respondents during the four-year period, coupled with petitioner's presence in the market as an affected competitor, does not constitute sufficient overtness to sustain a cause of action against a limitations defense (Pet. p. 9).

The short answer is that neither of the courts below passed upon these esoteric theories first put forward in the petition. Rather, after evaluating Mr. Ellingson's deposition and trial testimony and the documentary evidence, the district court found that ". . . any act of the defendant which may have damaged the plaintiff occurred prior to June 8, 1963," and that petitioner's claim that it had been damaged by acts of the respondents which occurred within the limitations period ". . . is not supported by any evidence" (App. p. 78a). In view of the Court of Appeals affirmance, this basic factual finding is controlling. With respect to the rule of law applicable, petitioner states it is ". . . content with the requirement that it prove overt acts *and* injury within four years preceding the filing of the complaint" (Pet. p. 26, and cases cited at Note 14). In fact, the trial court did apply this rule of law, best summarized in such cases as *Steiner* v. *20th Century-Fox Film Cor-*

poration, 232 F.2d 190 (C.A. 9, 1956); *Peto* v. *Madison Square Garden Corporation*, 384 F.2d 682 (C.A. 2, 1967), cert den. 390 U.S. 989, reh. den. 390 U.S. 1046 and *Exhibitor's Poster Exch. Inc.* v. *National Screen Serv. Corp.*, 421 F.2d 1313 (C.A. 5, 1970).

IV

Finally, petitioner seeks review by this Court because of a claimed deprival of the constitutional right to a jury trial of the factual issues involved in the trial on the segregated issues. Petitioner claims that the Court of Appeals erred in holding that petitioner waived this right.

In view of the petitioner's failure to demand a jury trial at the time of pretrial and trial, or to object to trial before the court alone, it is clear that the Court of Appeals correctly followed this Court's decision in *Duignan* v. *United States*, 274 U.S. 195 (1927), that the right to a jury trial may be waived where there is an appearance and participation in the trial before the court alone.

Furthermore, the pretrial order approved in writing by petitioner's counsel prior to the trial, made it clear that the issues were to be submitted to the court alone. Thus, there was a "written stipulation" for nonjury trial, as specified in Rule 39(a)(1) of the Federal Rules of Civil Procedure.

CONCLUSION

On the record before this Court, there is no substantial question or legal issue of public importance. The petition is only petitioner's last desperate effort to prolong a twelve-year-old controversey with respondents, commencing in June 1958 when petitioner filed its complaint with the Interstate Commerce Commission, continuing with an Oregon state court action filed in 1964, and later abandoned, and culminating in the commencement of this action in 1967.

The petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit should be denied.

Respectfully submitted,

HUGH L. BIGGS
CLEVELAND C. CORY
Attorneys for Respondent
Great Northern Railway Company